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No. 90-1666

In the Supreme Court of the United States

OCTOBER TERM, 1991

KOBY DEAN BOYETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's exclusion of the testimony of two defense witnesses, after they had asserted their Fifth Amendment privilege against compelled self-incrimination, violated petitioner's rights under the Compulsory Process Clause of the Sixth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 923 F.2d 378.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. The petition for a writ of certiorari was filed on April 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of aiding and abetting the attempted manufacture of methamphetamine, in violation of 21

U.S.C. 841(a)(1) and 846, and 18 U.S.C. 2. He was sentenced to ten years' imprisonment. The court of appeals affirmed. Pet. App. 1a-5a.

1. In June 1989, petitioner moved to Spring, Texas, to live with his cousin, Troy Jones, and Jones's girlfriend, Carrie Brown. Soon after moving in, petitioner discovered a methamphetamine laboratory in the attic of his cousin's duplex. On June 27, 1989, petitioner drove Jones to a nearby chemical supply store, which was under surveillance by agents of the Drug Enforcement Administration (DEA). The agents watched as Jones purchased various chemicals known to be used in the manufacture of methamphetamine. As Jones was completing the purchase, petitioner entered the store and spoke to him for a moment. After they left the store, petitioner and Jones realized that they were being followed. In an attempt to evade the DEA agents, petitioner drove through a shopping center parking lot several times. Pet. App. 2a; Gov't C.A. Br. 2-4.

Petitioner and Jones eventually returned to the duplex. That evening, Jones manufactured methamphetamine in the attic laboratory, producing smells powerful enough to be detected by agents conducting surveillance across the street from the duplex. The following morning, the agents saw petitioner nervously and repeatedly going in and out of the duplex. Pet. App. 2a; Gov't C.A. Br. 4.

The agents obtained a warrant and searched the duplex later that day. In addition to finding the attic laboratory, the agents found traces of methamphetamine in petitioner's room, which was located in a loft area only a few yards from the entrance to the attic and which was filled with a strong smell of methamphetamine. After the search, the agents questioned Jones and Brown, both of whom denied that

petitioner had participated in the methamphetamine operation. Pet. App. 3a; Gov't C.A. Br. 4-6.

2. Early in the trial, petitioner's counsel announced that he intended to call Jones and Brown as defense witnesses. The government objected, anticipating that those witnesses might frustrate cross-examination by invoking their Fifth Amendment privilege against compelled self-incrimination in response to government questions. To determine the validity and scope of the witnesses' assertion of the Fifth Amendment privilege, the district court held an evidentiary hearing out of the presence of the jury. Pet. App. 3a; Gov't C.A. Br. 10.

At the hearing, Jones testified that petitioner neither knew about nor participated in the methamphetamine manufacturing operation. When the prosecutor sought to cross-examine him, Jones repeatedly invoked his Fifth Amendment privilege.[1] Noting Jones's refusal to answer questions relating to petitioner's knowledge of the methamphetamine operation, the district court excluded Jones's testimony. Pet. App. 3a; Gov't C.A. Br. 10-11.

Brown declined to answer any questions at the evidentiary hearing, asserting her Fifth Amendment privilege against compelled self-incrimination. Petitioner's counsel then summarized the testimony he was seeking to elicit. In response to the court's inquiry whether she was willing to answer defense counsel's questions, Brown again invoked her Fifth Amendment privilege, whereupon the court excused

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[1] Jones refused to answer questions about how many times he had manufactured methamphetamine, whether he had manufactured methamphetamine at the duplex between June 1 and June 28, and whether he had "powdered out" methamphetamine at the duplex. Gov't C.A. Br. 11.

her from testifying. Pet. App. 3a; Gov't C.A. Br. 11-12.

3. The court of appeals affirmed, rejecting petitioner's contention that the exclusion of the testimony of Jones and Brown violated petitioner's right under the Sixth Amendment to compulsory process. Pet. App. 3a-4a. The court stated that the Sixth Amendment does not entitle a defendant to overcome a witness's assertion of the Fifth Amendment privilege; rather, "an accused's right to compulsory process must give way to the witness' Fifth Amendment privilege not to give testimony that would tend to incriminate him." Pet. App. 4a, quoting *United States* v. *Khan*, 728 F.2d 676, 678 (5th Cir. 1984). Applying that principle, the court upheld the district court's exclusion of proposed defense witness testimony in this case.

The court observed that the district court had "properly investigated the legitimacy and scope of the privileges extending to Jones and Brown" and had determined that they were "well-founded." Pet. App. 4a. The court stated that there was "substantial support in the record" for the findings that the witnesses had invoked the Fifth Amendment because of a "reasonable apprehension of prosecution," and that their claims of privilege "encompassed matters material to [petitioner's] knowledge of and involvement in the methamphetamine operation." *Ibid.* The court also concluded that the district court "acted well within its discretion in striking all, not merely a portion, of the testimony of these witnesses." *Ibid.*, citing, *inter alia*, *United States* v. *Nobles*, 422 U.S. 225, 241 (1975).

ARGUMENT

Petitioner renews his contention (Pet. 8-20) that the exclusion of the testimony of Jones and Brown violated his right under the Sixth Amendment's Compulsory Process Clause to present witnesses in his defense. That claim does not warrant this Court's review.

1. Petitioner initially asserts (Pet. 12-13) that the court of appeals erred in adopting a "per se rule" that a defendant's right to compulsory process cannot supersede a witness's assertion of the privilege against compelled self-incrimination. The court's holding, however, is consistent with the settled rule that the right to compel the attendance of witnesses does not encompass the right to compel a witness to waive his Fifth Amendment privilege. See, *e.g.*, *Diggs* v. *Owens*, 833 F.2d 439, 444 (3d Cir. 1987), cert. denied, 485 U.S. 979 (1988); *United States* v. *Paris*, 827 F.2d 395, 399 (9th Cir. 1987); *United States* v. *Thornton*, 733 F.2d 121, 125 (D.C. Cir. 1984).

Contrary to petitioner's suggestion (Pet. 10-11, 20), that rule is not inconsistent with decisions of this Court invalidating procedural and evidentiary rules that prevent a defendant from offering relevant evidence at trial to support his defense. See *Rock* v. *Arkansas*, 483 U.S. 44 (1987); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Washington* v. *Texas*, 388 U.S. 14 (1967). Crucial to the Court's decision in each of those cases was its determination that the particular restriction at issue was an "arbitrary" limitation on the defendant's opportunity to offer exculpatory evidence. See *Rock*, 483 U.S. at 61 (state evidentiary rule prohibiting defendant from offering his own hypnotically refreshed testimony was an "ar-

bitrary" restriction on defendant's right to testify on his own behalf); *Chambers*, 410 U.S. at 296, 302 (holding invalid combined application of voucher rule, under which defendant was bound by direct testimony of any defense witness, and state hearsay rule, which "mechanistically" excluded reliable evidence); *Washington*, 388 U.S. at 23 (evidentiary rule prohibiting defendant from introducing accomplice's testimony "arbitrarily" denied the defendant the right to present relevant evidence). Nothing in those decisions supports petitioner's claim that a defendant's right to present favorable testimony should supersede a witness's invocation of a constitutional privilege. Indeed, the Court emphasized in *Washington* that its opinion should not "be construed as disapproving testimonial privileges, such as the privilege against self-incrimination." 388 U.S. at 23 n.21.

2. Petitioner also contends (Pet. 13-15) that the district court erred in excluding all of Jones's testimony; he asserts that Jones should have been allowed to testify about matters as to which he was willing to waive the Fifth Amendment privilege. A defendant's right to present witnesses in his defense, however, does not carry with it the right to avoid cross-examination. See *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958); *United States* v. *Parcels of Land*, 903 F.2d 36, 43 (1st Cir.), cert. denied, 111 S. Ct. 289 (1990); *United States* v. *Herrera-Medina*, 853 F.2d 564, 567-568 (7th Cir. 1988); *Lawson* v. *Murray*, 837 F.2d 653, 655-656 (4th Cir.), cert. denied, 488 U.S. 831 (1988); *United States* v. *Doddington*, 822 F.2d 818, 822 (8th Cir. 1987); *United States* v. *Ferguson*, 758 F.2d 843, 849 (2d Cir.), cert. denied, 474 U.S. 841, 1032 (1985). Absent the opportunity for cross-examination, the jury is apt

to get a distorted picture of the truth; cross-examination is therefore necessary to assure that the truth-seeking function of the trial is fulfilled. As this Court stated in *United States* v. *Nobles*, 422 U.S. 225, 241 (1975), "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." Just as this Court in *Nobles* upheld the exclusion of a defense investigator's testimony when the defendant declined to produce the investigator's notes for use in cross-examination, the court of appeals in this case properly refused to allow petitioner to present testimony favorable to his defense where the government would be deprived of the opportunity for cross-examination.

The decision in *United States* v. *Lord*, 711 F.2d 887 (9th Cir. 1983), does not conflict with the result here. In *Lord*, the court concluded that because the government's proposed cross-examination of a defense witness had only collateral value, the witness's limited invocation of her Fifth Amendment rights did not support the exclusion of her entire testimony.[2] Here, in contrast, the government's proposed cross-examination of Jones did not go to collateral matters.

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[2] In *Lord*, the defense witness testified on direct examination that a DEA informant had previously badgered people for drugs; on cross-examination, the government asked the witness to name people she had introduced to the DEA informant as drug suppliers. 711 F.2d at 889. The court held that "[s]pecific names of suppliers [did] not pertain" directly to the witness's testimony; thus, it was error to strike her entire testimony when she refused to provide the names on Fifth Amendment grounds. *Id.* at 892.

The government proposed to inquire about other instances of Jones's manufacture of methamphetamine while petitioner lived at the duplex; that line of questioning went to the heart of Jones's testimony that petitioner was not aware of the drug manufacturing activity. Accordingly, the court of appeals correctly upheld the district court's conclusion that the denial of that cross-examination justified exclusion of Jones's entire testimony.

3. Finally, petitioner contends (Pet. 15-17) that the district court did not make a sufficient inquiry into the "merit and parameters" of Brown's assertion of the Fifth Amendment privilege. That claim is not only factbound, but also lacks merit.[3]

Petitioner indicated that he wanted to ask Brown to confirm her prior out-of-court statements that pe-

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[3] Petitioner also insists (Pet. 14) that the decision in this case conflicts with prior Fifth Circuit decisions, but this Court does not sit to review such alleged intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). In any event, this case is unlike *United States* v. *Goodwin*, 625 F.2d 693 (5th Cir. 1980), and *United States* v. *Gomez-Rojas*, 507 F.2d 1213 (5th Cir.), cert. denied, 423 U.S. 826 (1975). In *Goodwin*, the court held that the district court erred in allowing witnesses to make "blanket assertions of their Fifth Amendment rights regardless of the questions to be asked by defense counsel." 625 F.2d at 701. Similarly, in *Gomez-Rojas*, the district court "excused [the witness] without the slightest inquiry into the legitimacy or the scope of his proposed refusal to testify." 507 F.2d at 1217. Here, the court made an inquiry appropriate to the circumstances. Petitioner also cites *United States* v. *Melchor-Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976), but that case involved a witness whose assertion of his Fifth Amendment privilege was rejected because he was acting in cooperation with law enforcement agents during the drug transaction about which the defendant's counsel wished to question him. There was no similar cooperation present here.

titioner was not involved in the offenses for which he was on trial. The court then specifically asked Brown whether she wanted to answer those questions; Brown invoked her Fifth Amendment privilege. Gov't C.A. Br. 12. That inquiry was adequate to allow the court to determine that Brown had a valid claim of privilege with respect to petitioner's proposed questions. The court was well aware that Brown, like petitioner, had been living with Jones in the duplex where methamphetamine was being manufactured. Any testimony Brown could have given would have had the obvious potential to incriminate her in connection with the methamphetamine operation. See *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951) ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.").[4]

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[4] Although acknowledging that the government could not have been required to grant immunity to Jones and Brown so that they could testify at his trial, petitioner insists (Pet. 19) that the district court "should have considered the Government's unilateral right * * * [to grant immunity] in determining whether the Government was denied effective cross-examination." Petitioner, however, offers no support for that contention, and it is without merit. If courts could consider the government's power to grant immunity in determining whether defense witnesses may testify notwithstanding their intention to assert the Fifth Amendment on cross-examination, the net result would be a Hobson's choice for the government: either to allow a defense witness to thwart effective cross-examination, or to grant immunity where it would not otherwise be justified by legitimate government interests. The Sixth Amendment does not entitle a defendant to put the gov-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ernment in that position. Cf. *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261-262 (1983).

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